SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 15, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Román, JJ.

6072 Richard T. Fitzsimmons, et al., etc., Index 651360/10
Plaintiffs-Respondents,

-against-

Pryor Cashman LLP, et al.,
Defendants-Appellants.

_____

Pryor Cashman LLP, New York (Gideon Cashman of counsel), for appellants.

Schulte Roth & Zabel LLP, New York (Ronald E. Richman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 10, 2011, which, in a legal malpractice action alleging, among other things, that defendants failed to notify plaintiffs of information indicating that money may have been misappropriated from the benefit funds of which plaintiffs were trustees, denied defendants' motion to dismiss the complaint based on documentary evidence and for failure to state a cause of action, unanimously affirmed, without costs.

The court applied the correct standard and properly held that the complaint states a cause of action for legal malpractice. Plaintiff put forth sufficient detail to establish the negligence of the attorneys, that the negligence was the proximate cause of the losses sustained by the benefits funds, and actual damages to those funds (*see Leder v Spiegel*, 9 NY3d 836, 837 [2007], *cert denied* 552 US 1257 [2008]; *O'Callaghan v Brunelle*, 84 AD3d 581, 582 [2011], *lv denied* __ NY3d __, 2012, NY Slip Op 61183 [2012]). Contrary to defendants' contention, plaintiffs were not required to allege the specific scope of defendants' agreed-upon legal representation nor that defendant's malpractice fell within such scope (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 39 [2006] ["(A) legal malpractice plaintiff need not, in order to assert a viable cause of action, specifically plead that the alleged malpractice fell within the agreed scope of the defendant's representation"). Moreover, the documentary evidence — including Form 5500s, minutes of a 1997 Board meeting, and Department of Labor letters — does not conclusively disprove plaintiffs' allegations (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Plaintiffs' expert affidavit was properly considered to

remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

We have considered defendants' remaining contentions and find them unavailing.

The Decision and Order of this Court entered herein on November 17, 2011 is hereby recalled and vacated (*see* M-5578 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6258 The People of the State of New York, Respondent, Ind. 5759/03 620/04

-against-

Claude Danton, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about January 22, 2010, which denied CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly determined that defendant was ineligible for resentencing because of his prior violent felony conviction, even though it did not serve as the basis for his adjudication as a second felony offender on the instant convictions (*see People v Steward*, __ NY3d __, 2012 NY Slip Op 01099 [2012]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

6658-
6659- Angel Melo, Index 16028/06
Plaintiff-Respondent,

-against-

Morm Management Co., et al.,
Defendants-Appellants.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Timothy R. Capowski of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered November 19, 2010, after a jury trial, awarding plaintiff damages, and bringing up for review an order, same court and Justice, entered June 24, 2010, which granted defendants' motion to set aside the verdict only to the extent of reducing the awards for medical expenses, unanimously reversed, on the law and the facts, without costs, the judgment is vacated, and the motion is granted to the extent of vacating all damages awards and remanding the matter for a new trial on damages, to the extent it is determined, consistent with this decision, that they have resulted solely from defendants' negligence. Appeal from the foregoing order unanimously dismissed, without costs, as

subsumed in the appeal from the judgment.

Plaintiff testified that he exited the elevator in the basement of defendants' building believing that the elevator door was level with the basement floor, that the basement was dark, and that he took one or two steps and fell to the floor from what turned out to be a one-step platform. While plaintiff did not establish that defendants had notice of any defective lighting condition in the basement, his safety expert's testimony that the condition of the single-step platform was dangerous even with adequate lighting provides a rational basis for the jury's findings that defendants were negligent and that plaintiff was not comparatively negligent (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). The jury's resolution of any credibility issues in plaintiff's favor is entitled to deference (*see Haiyan Lu v Spinelli*, 44 AD3d 546 [2007], *lv denied* 10 NY3d 716 [2008]). The court properly allowed the safety expert to testify as to safety engineering based upon his experience and training despite the fact that he was not a licensed engineer (*see e.g. Sumowicz v Gimbel Bros.*, 161 AD2d 314, 315 [1990]).

However, a new trial is required on the issue of whether defendants' negligence was the sole cause of the damages alleged by plaintiff. There was evidence at trial that plaintiff

suffered a stroke two days after undergoing a diskectomy that was necessitated by injury plaintiff suffered as a result of the accident. Dr. Murray, plaintiff's medical expert, opined that an elevation in plaintiff's blood pressure resulting from the injury and the stress of surgery caused plaintiff to suffer the stroke. On the other hand, Dr. Feuer, defendants' medical expert testified that the surgery had nothing to do with the stroke. As a basis for his opinion, Dr. Feuer cited MRI findings of pre existing multiple cerebral ischemic changes that were indicative of mini-strokes. After both sides rested, plaintiff moved to strike Dr. Feuer's testimony, on the ground, among others, that defendants' expert exchange contained no indication that Dr. Feuer would testify about the mini-strokes described above. Prior to summations, the court granted the motion to the extent of instructing the jury to disregard all testimony about mini-strokes. This was error because Dr. Feuer's report, which was annexed to defendants' expert exchange, indeed referenced the MRI report and its findings of "old infarcts and microvascular ischemic changes." Moreover, the report contained the conclusion that the ischemic vascular changes of the brain, among other things, would predispose plaintiff to subsequent ischemic events, including a stroke. In this respect, defendants' expert exchange

was adequate and did not result in prejudice or surprise to plaintiff (*see e.g. Popkave v Ramapo Radiology Assoc., P.C.*, 44 AD3d 920 [2007]). Defendants' case was prejudicially compromised insofar as the jury was not allowed to consider the basis for Dr. Feuer's opinion that plaintiff's stroke was unrelated to the surgical procedure. We do not deem the error harmless because a jury is presumed to have followed a trial court's instructions (*see Huff v Rodriguez*, 88 AD3d 1274, 1276 [2011], *appeal dismissed* __ NY3d __, 2012 NY Slip Op 60582 [2012]). On this record, however, we find no error in the court's similar instruction that the jury was to disregard testimony regarding diabetes. We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7095-
7096 Nicholas Martino, et al., Index 110227/06
Plaintiff-Respondents,

-against-

John A. Bendo, M.D.,
Defendant-Appellant.

_____

McAloon & Friedman, P.C., New York (Gina B. Di Folco of counsel), for appellant.

Asher & Associates P.C., New York (Robert J. Poblete of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered January 3, 2011, which, insofar as appealed from, denied the motion of defendant orthopedic surgeon for summary judgment dismissing the first and third causes action alleging medical malpractice and loss of consortium, and granted plaintiffs' cross motion to amend the bill of particulars, unanimously affirmed, without costs. Order, same court and Justice, entered June 14, 2011, which, upon renewal, adhered to its original determination, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in granting plaintiffs' cross motion to amend the bill of particulars (*see* CPLR 3025; *Alvarado v Beth Israel Med. Ctr.*, 78

AD3d 873 [2010]). Although the motion was made after the note of issue was filed and a new theory of liability will generally not be considered if asserted for the first time in response to a motion for summary judgment (*see Abalola v Flower Hosp.*, 44 AD3d 522 [2007]), here, the amended allegations did not amount to new theories of liability. Rather, plaintiffs expounded upon the allegations asserted in the complaint and first supplemental bill of particulars, namely, that the spinal fusion procedure performed by defendant in 2004 was contraindicated.

We note defendant declined the court's offer to have his expert submit a supplemental medical opinion in response to the opinion proffered by plaintiffs' expert, and defendant did not request additional discovery in the action. Furthermore defendant did not demonstrate how he was prejudiced by the delay (*see Cherebrin v Empress Ambulance Serv., Inc.*, 43 AD3d 364 [2007]).

While plaintiffs' expert, a board certified orthopedic surgeon who specialized in joint replacements, was not a specialist in spinal surgery, the court properly found him qualified to render an opinion as to whether defendant had deviated from accepted medical practice in performing the surgical procedure (*see Fuller v Preis*, 35 NY2d 425, 431 [1974];

Farkas v Saary, 191 AD2d 178, 181 [1993]). Plaintiffs' expert had training in spinal surgery, had practiced as an orthopedic surgeon for 30 years, and his findings were found to be detailed, based upon the evidence, and not challenged by defendant.

In view of the amended allegations and based upon the opinions of plaintiffs' expert, plaintiffs raised triable issues of fact warranting the denial of defendant's motion for summary judgment (*see Alvarado* at 874-875; *compare Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514 [2007]).

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7097 In re Paulidia Antonis R., etc.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Lidia R., etc.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Randall S. Carmel, Syosset, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 9, 2010, which, upon a finding of mental illness, terminated respondent mother's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent is mentally ill within the meaning of Social Services Law § 384-b(4)(c) and § 384-b(6)(a) is supported by clear and convincing evidence. The agency presented testimony from two psychologists who, after reviewing

respondent's medical records and interviewing her, found that she suffers from schizoaffective disorder which affects her judgment and ability to parent. Her illness renders her incapable of caring for the child presently and for the foreseeable future (*see Matter of Phajja Jada S.* [*Toenor Ann S.*], 86 AD3d 438 [2011], *lv denied* 13 NY3d 716 [2011]).

Although respondent's expert did not agree with the diagnosis, the court found that her expert, who had not thoroughly considered respondent's extensive medical records, lacked credibility. There is no basis for disturbing this credibility determination, which is entitled to deference (*see Matter of Kathleen OO., 232 AD2d 784 [1996]*).

We have considered respondent's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7098 Jennifer Ellis, Index 110141/09
Plaintiff-Appellant,

-against-

Jennifer Park, et al.,
Defendants-Respondents,

Board of Managers of Central Park Place Condominium, et al.,
Defendants.

_____

The Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (Susan M. Ulrich of counsel), for Park respondents.

Hiscock & Barclay, LLP, New York (Todd V. Lamb of counsel), for Prudential Douglas Elliman, respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 24, 2010, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3126, unanimously reversed, on the law and facts, without costs, and the motions denied.

Dismissal of the complaint was an improvident exercise of discretion, since defendants failed to "show[] conclusively that [plaintiff's] failure to disclose was wilful, contumacious or in

bad faith" (*Christian v City of New York*, 269 AD2d 135, 137 [2000]; *see also Mateo v T & H Enters.*, 60 AD3d 411 [2009]). Contrary to the motion court's findings, the record does not support the view that plaintiff repeatedly refused to comply with orders regarding disclosure. The argument that plaintiff responded only to defendant Prudential's demand for a bill of particulars and not the demand of defendants Parks, is belied by plaintiff's responses to the demand.

Moreover, the November 16, 2009 preliminary conference order directed plaintiff to be deposed on January 6, 2010. However, during a subsequent telephone conference with the court, plaintiff and the Parks agreed to postpone the deposition to a mutually convenient date. Thus, the fact that plaintiff was not deposed by January 6, 2010 does not constitute disobedience of a court order. Plaintiff appeared and was deposed on two dates set by the court and although it is true that on the third day of her

deposition she said she could not stay beyond 11:45 A.M., she provided a reasonable explanation for having to leave and her counsel was actually engaged later that day.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7101 The People of the State of New York, Ind. 5651/07
Respondent,

-against-

Anthony Wilson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jonathan V. Brewer of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about December 2, 2009,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 15, 2012

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7102 In re Adoption of a Child Whose First Name is Katharine

File 195/09

- - - - -

Claire Gorayeb,
Petitioner-Respondent,

-against-

Edward Kranz,
Respondent-Appellant.

_____

Edward Kranz, appellant pro se.

Dunnington, Bartholow & Miller, LLP, New York (Raymond J. Dowd of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, J.), entered on or about January 19, 2011, which granted petitioner's motion for summary judgment determining that respondent father's consent for the adoption of the subject child is not required, and directed that the matter proceed, unanimously affirmed, without costs.

The father's consent for the adoption of his child was not required, since he admitted that he never provided financial support for the child (*see* Domestic Relations Law § 111[1][d]; *Matter of Cassandra Tammy S. [Babbah S.]*, 89 AD3d 540, 540 [2011]). The failure of the mother or her sister to notify the father of his support obligation did not excuse him from

providing such support (*Cassandra Tammy S.*, 89 AD3d at 540).

The father has not provided any evidence to support his assertion that he was unable to provide financial support for the child. Nor has he presented evidence that the Surrogate Court was biased or otherwise mishandled the adoption or guardianship proceedings. Indeed, the father voluntarily consented to withdraw his Family Court petition and proceed in Surrogate's Court. The Surrogate's Court had no obligation to inform him of the guardianship petition filed by petitioner upon the death of the child's mother. In addition, the Surrogate's Court expressly noted that the father has the right to be heard at the dispositional hearing regarding the best interests of the child (*see* Domestic Relations Law § 111-a[2][a], [3]).

We have considered the father's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7103-
7104 Sean Nielsen, et al., Index 106040/08
Plaintiffs-Appellants-Respondents,

-against-

New York State Dormitory Authority,
Defendant-Respondent,

McKissack Turner Construction/JV,
Defendant-Respondent-Appellant.

[And Other Actions]

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Paul Wooten, J.), entered on or about June 8, 2011,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 23, 2012,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7105-
7105A Mutual Benefits Offshore Fund, Index 650438/09
Plaintiff-Respondent,

-against-

Emanuel Zeltser, et al.,
Defendants-Appellants,

Mark Zeltser, et al.,
Defendants.
- - - - -
Sternik & Zeltser, etc., et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Christopher Samuelson, et al.,
Counterclaim Defendants.

_____

Sternik & Zeltser, New York (Emanuel Zeltser of counsel), for Sternik & Zeltser.

Emanuel Zeltser, New York, appellant pro se.

Bruce D. Katz & Associates, New York (Bruce D. Katz of counsel), for Joseph Kay, appellant.

Gusrae Kaplan Nusbaum PLLC, New York (Mikhail Ratner and Martin P. Russo of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered November 4, 2010, which granted plaintiff's motion to dismiss defendants Sternik & Zeltser and Joseph Kay's counterclaims, and granted plaintiff's motion to disqualify

defendants Emanuel Zeltser and Sternik & Zeltser as counsel for counterclaim-plaintiffs, unanimously affirmed, without costs.

Sternik & Zeltser, sued herein solely in its capacity as plaintiff's former counsel, lacks standing to assert a counterclaim in its separate capacity as a purported trustee or representative of an entity that is not a party to the action (*see Ruzicka v Rager*, 305 NY 191, 198 [1953]; *see also Bramex Assoc. v CBI Agencies*, 149 AD2d 383, 385 [1989]). Kay lacks standing to assert a counterclaim because the record does not support his allegation that he has an ownership interest in plaintiff's investment or that he otherwise has a stake in the outcome of the dispute over the funds at issue (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [2006], *appeal dismissed* 8 NY3d 837 [2007]).

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7106 In re Markquel S.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about January 20, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, criminal possession of a weapon in the fourth degree and menacing in the second degree, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Appellant tried to stab a fellow student with a pencil, and when the victim tried to shield his face by putting up his hands, appellant stabbed at the

victim again. This time the pencil lodged in the victim's wrist, caused a painful puncture wound, and had to be removed by the school nurse. This evidence established all of the elements of the offenses at issue, and it undermines appellant's argument that he was merely engaging in horseplay.

The pencil was a dangerous instrument (*see* Penal Law § 10.00[13]) because it was readily capable of causing serious physical injury under the circumstances of its use, regardless of the level of injury actually inflicted (*see People v Molnar*, 234 AD2d 988 [1996], *lv denied* 89 NY2d 1038 [1997]). Appellant's intent to cause physical injury, at least, could be readily inferred from his actions (*see People v Getch*, 50 NY2d 456, 465 [1980]), and the evidence established that physical injury resulted (*see People v Chiddick*, 8 NY3d 445 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence also established menacing, in that appellant placed the victim in reasonable fear of physical injury.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7107 Stanley Cohen, Index 303123/09
Plaintiff-Respondent,

-against-

Pauline Cohen,
Defendant-Appellant.

_____

David Scott, New York (Paul Biedka of counsel), for appellant.

Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered September 20, 2010, which, in this action for divorce, denied defendant's motion to vacate and declare void and/or set aside a prenuptial agreement or to set the matter down for a hearing on the circumstances surrounding its execution, and denied her motion for an injunction with respect to certain assets, unanimously affirmed, without costs.

The motion to vacate or set aside the parties' prenuptial agreement was properly denied without a hearing, as defendant failed to meet her burden of presenting evidence of fraud, duress or overreaching with respect to the agreement, which was executed in France and written in defendant's native tongue (*see Stawski v Stawski*, 43 AD3d 776, *777* [2007]; *Forsberg v Forsberg*, 219 AD2d

615, 616 [1995]). Defendant's contradictory affidavit and her doctor's letter do not support her suggestion that, because of her pregnancy, she lacked the mental capacity to understand or execute the agreement. Further, plaintiff's alleged threat to cancel the wedding if defendant refused to sign the agreement does not constitute duress (*Colello v Colello*, 9 AD3d 855, 858 [2004], *lv denied* 11 AD3d 1053 [2004]). Nor does the absence of legal representation establish overreaching or require an automatic nullification of the agreement (*see id.*), especially as the evidence shows that the agreement was prepared by an independent public official unaligned with either party. Plaintiff's alleged failure to fully disclose his financial situation is also insufficient to vitiate the prenuptial agreement (*Strong v Dubin*, 48 AD3d 232, 233 [2008]). Indeed, there is no evidence that plaintiff concealed or misrepresented any financial information or the terms of the agreement (*id.*).

To the extent the prenuptial agreement, to be enforceable in New York, must contain an acknowledgment sufficient to entitle a real property deed to be recorded (*see* Domestic Relations Law § 236[B][3]), this requirement was satisfied by plaintiff's filing, at the direction of the court, of a certificate of conformity attesting to the credentials of the French official

who drafted the agreement, and certifying that his proof of acknowledgment of the agreement conformed to the laws of France (*see* Real Property Law § 301-a).

There was no basis for restraining the subject assets, as defendant failed to show that they are not owned by plaintiff separately under the terms of the prenuptial agreement (*see Guttman v Guttman*, 129 AD2d 537, 539 [1987]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7108 The People of the State of New York, Ind. 532/09
Respondent,

-against-

Samuel Rivera,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about January 13, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 15, 2012

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7109 In re Daniel Hogg, Index 112839/09
Petitioner-Appellant,

-against-

Raymond Kelly, as Police Commissioner
of the City of New York, etc., et al.,
Respondents-Respondents.

Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered May 10, 2010, denying the petition seeking, inter alia, to annul a determination of respondent Board of Trustees, which denied petitioner's application for accidental disability retirement benefits and granted him ordinary disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner's condition was not incurred in the line of duty had a rational basis. The evidence included the opinion of petitioner's treating cardiologist that petitioner's stroke was "associated with" congenital heart defects which made a "presumptive diagnosis of paradoxical

embolism a leading explanation for his stroke." Such evidence sufficed to rebut the statutory presumption set forth in General Municipal Law § 207-k (*see Matter of Higgins v Kelly*, 84 AD3d 520 [2011], *lv denied* NY3d __, 2012 NY Slip Op 63959 [2012]; *Matter of Simmons v Herkommer*, 98 AD2d 651, 652 [1983], *affd* 62 NY2d 711 [1984]). Moreover, the opinion of petitioner's treating vascular neurologist, who opposed the determination that the stroke was related to petitioner's heart defects, was that the stroke was of unknown origin. A finding of unknown origin itself rebuts the statutory presumption that the disabling condition was incurred in the line of duty (*see Matter of Goldman v McGuire*, 101 AD2d 768, 769 [1984], *affd* 64 NY2d 1041 [1985]; *see also Matter of Gumbrecht v McGuire*, 117 AD2d 531, 533 [1986]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7110 The People of the State of New York, Ind. 83/10
Respondent,

-against-

Jihoon Lee,
Defendant-Appellant.

Talkin, Muccigrosso & Roberts, LLP, New York (Sanford N. Talkin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Sonberg J.), rendered December 7, 2010, convicting defendant, after a jury trial, of bribery in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

The court properly denied defendant's request for an instruction on the affirmative defense of entrapment. There was no reasonable view of the evidence that the officers induced or encouraged defendant to commit bribery, or that their conduct created a substantial risk that defendant would commit that crime although not otherwise disposed to do so (*see* Penal Law § 40.05; *People v Brown*, 82 NY2d 869 [1993]; *People v Butts*, 72 NY2d 746 [1988]).

The officers testified that defendant initiated the crime by

making several unrecorded bribe offers, and there was no evidence casting doubt on their testimony. The police then engaged defendant in a conversation that they secretly taped. This procedure merely gave defendant a further opportunity to commit the crime (*see People v Sierra*, 65 AD3d 968 [2009], *lv denied* 13 NY3d 910 [2009]).

Defendant's assertion that, in the unrecorded conversations, the police may have engaged in conduct constituting entrapment rests entirely on speculation. That speculative inference is not supported by anything in the recorded conversation, or by an officer's inartful description of that conversation as designed to "elicit" or "solicit" a bribe offer.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits

review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7111 Juan A. Rosario, Index 304017/10
Plaintiff-Appellant,

-against-

William Vasquez, et al.,
Defendants-Respondents.

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Greenstein & Milbauer, LLP, New York (Christopher O'Donnell of counsel), for appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered September 19, 2011, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law as to liability by submitting his affidavit stating that, while his vehicle was stopped at a red light, it was struck in the rear by a vehicle operated by defendant Guzman-Sosa and owned by defendant Vasquez (*Avant v Cepin Livery Corp.*, 74 AD3d 533, 534 [2010]).

In opposition, defendants failed to provide a nonnegligent explanation for the collision (*Avant*, 74 AD3d at 534); (*cf.*

Ebanks v Triboro Coach Corp., 304 AD2d 406 [2003]). The uncertified police accident report submitted by defendants constitutes hearsay and, in any event, does not support Guzman-Sosa's account of the accident (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [2010]).

Contrary to the motion court's finding, depositions are not needed, since Guzman-Sosa had personal knowledge of the facts (*see Avant*, 74 AD3d at 534).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7112N Debra Hutchinson, Index 13508/07
Plaintiff-Respondent,

-against-

Chana Weller, DDS, PLLC, et al.,
Defendants-Appellants.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao of counsel), for Chana Weller DDS, PLLC and Dr. Chana Weller, appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Arlene Bergman of counsel), for Zana Mihovilovic, D.D.S., appellant.

Belovin & Franzblau, LLP, Bronx (Jeffrey J. Belovin of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 3, 2011, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss the complaint based on lack of capacity to sue, unanimously affirmed, without costs.

"It is well settled that the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action" (*Barranco v Cabrini Med. Ctr.*, 50 AD3d 281, 281-282 [2008]; *see Gazes v Bennett*, 38 AD3d 287 [2007]). Neither ignorance of the law nor inadvertent mistake excuses a plaintiff's failure to list such a

claim as a potential asset in the bankruptcy petition (*see Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191, 196-197 [1987]; *Gray v City of New York*, 58 AD3d 448, 449 [2009], *lv dismissed in part, denied in part* 12 NY3d 802 [2009]).

However, on this record, it is unclear whether plaintiff knew or should have known of the facts allegedly giving rise to her dental malpractice claim (*cf. Whelan v Longo*, 7 NY3d 821 [2006]). It was not until plaintiff began treating with an endodontist on March 30, 2005, after the date of her discharge in bankruptcy, that she discovered the presence of a "metal file" or "pin" in her canal or gum. Although plaintiff testified that she did not list her dental malpractice claim as a contingent claim on her bankruptcy petition because she "didn't know [she] had to," it is unclear at this juncture whether her response was due to a lack of awareness of the law or of the facts underlying her claim.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Gonzalez, P.J., Tom, Sweeny, Renwick, Román, JJ.

5914 Hugo Gomez, et al., Index 652113/10
Plaintiffs-Respondents,

-against-

Brill Securities, Inc., et al.,
Defendants-Appellants.

_____

Mound Cotton Wollan & Greengrass, New York (Robert S. Goodman of counsel), for appellants.

Joseph, Herzfeld, Hester & Kirschenbaum LLP, New York (Michael D. Palmer of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 13, 2011, affirmed, with costs.

Opinion by Román, J. All concur except Sweeny and Renwick, JJ. who dissent in part in an Opinion by Sweeny, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
Dianne T. Renwick
Nelson S. Román, JJ.

5914
Index 652113/10

_____x

Hugo Gomez, et al.,
Plaintiffs-Respondents,

-against-

Brill Securities, Inc., et al.,
Defendants-Appellants.
_____x

Defendants appeal from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 13, 2011, which denied their motion to dismiss the complaint or, in the alternative, to compel arbitration and stay the action pending arbitration.

Mound Cotton Wollan & Greengrass, New York (Robert S. Goodman, Barry R. Temkin and Diana E. McMonagle of counsel), for appellants.

Joseph, Herzfeld, Hester & Kirschenbaum LLP, New York (Michael D. Palmer, Matthew Kadushin and Charles Joseph of counsel), for respondents.

ROMÁN, J.

When parties expressly agree to arbitrate their disputes we enforce their agreement and compel arbitration. However, the issue of whether to compel arbitration turns on the language of the agreement between the parties. Therefore, when an agreement to arbitrate expressly precludes arbitration under certain circumstances, and one of those enumerated circumstances exists, a party cannot be compelled to arbitrate. In this case, where the arbitration agreement expressly precludes arbitration if the otherwise arbitrable claims are brought via a plenary class action, we cannot compel arbitration since the agreement proscribes it.

This class action seeks declaratory relief and monetary damages for violation of 12 NYCRR 142-2.2 and New York Labor Law §§ 191(1)(c), 1193, and 198-b. Plaintiffs allege that they, along with all members of the putative class, were brokers employed by defendant Brill Securities, Inc.[1], a full-service broker-dealer offering a comprehensive range of financial and wealth management services for retail investors. While so

[1] The other defendants are Robert Brown, Chief Executive Officer and owner of Brill Securities, Inc. (Brill), Nicholas Brown, Chief Financial Officer and owner of Brill, Jonathan Kurtin, President and owner of Brill, and David Nutkis, Vice President and Chief Operating Officer of Brill.

employed, plaintiffs allege that despite working in excess of 40 hours per week, they were not paid the requisite overtime wages, in violation of 12 NYCRR 142-2.2; that defendants made impermissible wage deductions from their earned wages/commissions, in violation of New York Labor Law § 193; that defendants made illegal wage deductions from their wages/commissions, in violation of New York Labor Law § 198-b; and that defendants failed to pay them their wages/commissions as agreed, in violation of New York Labor Law § 191.

Plaintiffs are registered representatives in the securities industry. Each plaintiff was required to, and did, execute a Uniform Application for Securities Industry Registration or Transfer (Form U-4). Pursuant to § 15A of Form U-4, plaintiffs "agree[d] to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules . . . of [the Financial Industry Regulatory Authority (FINRA)]." FINRA Rule 13204(d) prohibits arbitration of class action claims and prohibits enforcement of "any arbitration agreement against a member of a . . . putative class action with respect to any claim that is the subject of the . . . class action" until certain conditions, inapplicable here, are met.

Before the initiation of this action, two of the plaintiffs

brought an action against the same defendants in the United States District Court for the Southern District of New York, asserting, via a class action, the state law claims alleged here, as well as a federal claim for overtime pay under the Fair Labor Standards Act (29 USC § 201), brought via a collective action (29 USC § 216[b]) (*see Gomez v Brill Secs., Inc.*, 2010 WL 4455827, 2010 US Dist LEXIS 118162 [SD NY 2010]). Asserting that plaintiffs' claims could not be brought via a plenary action, defendants moved to dismiss the federal action, or, alternatively, to stay the state claims and compel arbitration of plaintiffs' claims pursuant to the Fair Labor Standards Act (FLSA). Implicitly finding that the state class action claims were not arbitrable, the court stayed those claims and compelled arbitration of plaintiffs' claims pursuant to the FLSA. In compelling arbitration of the claims pursuant to the FLSA, the court found that while the agreement between the parties precluded arbitration of arbitrable claims brought by class action, "[t]here are significant differences between an opt-out class action and and opt-in FLSA collective action." After the court issued its decision, plaintiffs voluntarily dismissed the federal action.

Plaintiffs then commenced this action. Shortly thereafter, defendants moved to dismiss this action on grounds that it was

barred by the doctrine of res judicata (CPLR 3211[a][5]) and that it was barred by documentary evidence (CPLR 3211[a][1]), i.e., the agreement. Alternatively, defendants sought an order pursuant to CPLR 7503(a) compelling arbitration. Plaintiffs opposed defendants' motion and after oral argument the motion court denied defendants' motion in its entirety. The instant appeal then ensued.

Contrary to defendants' assertion, since the order issued by the District Court did not make any determination on the merits as to the state law claims, it has no res judicata effect on this action. The doctrine of res judicata serves to preclude a party from relitigating issues of fact and law decided in a prior proceeding. Specifically "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). By precluding the relitigation of redundant claims, res judicata promotes judicial economy and conserves judicial resources (*id*. at 485). Since res judicata precludes relitigation of issues actually litigated and resolved in a prior proceeding, the party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in a subsequent

action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue (*Matter of New York Site Dev. Corp. v New York State Dept. of Envtl. Conservation*, 217 AD2d 699, 700 [1995]). Here, the District Court, which stayed plaintiffs' state law claims, held by implication that plaintiffs' state law claims - the very claims they now assert - could not be arbitrated. Thus, far from precluding this action, the District Court's order bolsters plaintiffs' contention that arbitration of these claims is barred by the agreement between the parties and further belies defendants' res judicata claim. Moreover, the District Court's order cannot have a preclusive effect in this action insofar as the issue decided there - that plaintiffs must arbitrate their claims pursuant to the FLSA because under federal law those claims could not be brought by class action and were therefore not exempt from arbitration by the agreement - has no applicability here since nothing bars plaintiffs from bringing their *state* claims, pursuant to 12 NYCRR 142-2.2, by class action. To that end, we are not persuaded by defendants' assertion that insofar as 12 NYCRR 142-2.2 incorporates sections of the FLSA by reference, the District Court's order compelling arbitration of plaintiffs' prior FLSA claim bars, on grounds of

res judicata, plaintiffs' instant claim pursuant to 22 NYCRR 142-2.2. Notably, 12 NYCRR 142-2.2 only incorporates two sections of the FLSA, namely, 29 USC §§ 207 and 213, and critically unlike the FLSA, 12 NYCRR 142-2.2, does not, as noted above, preclude a class action suit. Thus, there is no substantial similarity between the prior FLSA claim and the current claim pursuant to 12 NYCRR 142-2.2 so as to invoke the doctrine of res judicata.

Insofar as, here, the agreement to arbitrate, by its very terms, clearly precludes arbitration when arbitrable claims are brought as a class action, plaintiffs cannot be required to arbitrate their class action claims. While "[i]t has long been this State's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration" (*Matter of Exercycle Corp. [Mararatta]*, 9 NY2d 329, 334 [1961]), whether arbitration is mandated, however, turns entirely on the language of the agreement between the parties (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984] ["It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to

arbitrate their disputes" (internal quotation marks omitted)]; *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. [United Liverpool Faculty Assn.]*, 42 NY2d 509, 512 [1977]; *Gulf Underwriters Ins. Co. v Verizon Communications, Inc.,* 32 AD3d 709, 710 [2006]; *Harris v Shearson Hayden Stone*, 82 AD2d 87, 95 [1981], *affd* 56 NY2d 627 [1982]). Accordingly, since an agreement to arbitrate is a contract, and when clear, shall "be enforced according to its terms," (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]; *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 943 [1995] ["arbitration is simply a matter of contract between the parties"]), while parties who clearly and expressly agree to arbitrate shall be so compelled, parties who unequivocally agree to forego arbitration under certain circumstances cannot be compelled to arbitrate when those enumerated circumstances exist.

Here, the agreement between the parties makes it exceedingly clear that arbitration shall be governed by the rules promulgated by FINRA. FINRA Rule 13204(d) prohibits arbitration of class action claims and specifically, prohibits enforcement of "any arbitration agreement against a member of a . . . putative class action with respect to any claim that is the subject of the . . . class action" until certain conditions, inapplicable here, are

met. Accordingly, based on the parties' own agreement, which incorporates by reference FINRA Rule 13204(d), arbitration of this class action suit is barred (*Velez v Perrin Holden & Davenport Capital Corp.*, 769 F Supp 2d 445, 446-447 [SD NY 2011] [Plaintiff's state law claims, brought as a class action, alleging that defendants failed to pay him overtime, commissions, and timely wages not arbitrable insofar as the agreement to arbitrate stated that arbitration would be governed by FINRA rules and FINRA Rule 13204(d) precludes arbitration of claims brought by class action]; *see Olde Discount Corp. v Hubbard*, 4 F Supp 2d 1268, 1271 [D Kan 1998], *affd* 172 F3d 879 [10th Cir. 1999]).

Contrary to defendants' contention, neither our holding in *Harris* nor the holdings by the United States Supreme Court in *Preston v Ferrer* (552 US 346 [2008]) and *AT&T Mobility LLC v Concepcion* (_ US _, 131 S Ct 1740 [2011]) warrant reversal of the motion court's decision and compulsion to arbitrate. In *Harris*, a case decided before the establishment of FINRA[2] and the rules it promulgated, and where the agreement to arbitrate did not

[2] FINRA succeeded the National Association of Securities Dealers, Inc. (NASD) in 2007 and while NASD Rule 10301(d) previously and similarly proscribed arbitration of any claims brought by class action, that rule did not take effect until 1992, approximately 10 years after our decision in *Harris*.

contain an exemption from arbitration for claims brought by class action, we held that the parties to that action were bound by a clear agreement to arbitrate disputes and that a class action suit alleging causes of action subject to arbitration would not preclude arbitration (*Harris* at 95). In staying arbitration here, we also enforce the express agreement between the parties as, which, incorporating by reference FINRA Rule 13204(d), precludes arbitration when arbitrable claims are brought by class action (*Neilsen v Piper, Jaffray & Hopwood, Inc.*, 66 F3d 145, 148-149 [1995], *cert denied* 516 US 1116 [1996] [arbitration stayed where agreement to arbitrate was governed by rules in chosen arbitration forum, one of which, NASD Rule 12(d), precluded arbitration when arbitrable claims were brought by class action]). *Preston* is also inapposite since in that case, the United States Supreme Court, reiterating that the law requires that parties be bound by their express arbitration agreements, held that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA [Federal Arbitration Act] supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative" (*Preston* at 359). Here, arbitration is not being stayed by virtue of any state law, but because of an exclusion to arbitration in the agreement itself. *AT&T Mobility, LLC* is similarly inapposite

since in that case the Court, reiterating that an agreement to arbitrate must be enforced as written, simply held that such an agreement, freely entered into, cannot be vitiated by a state law deeming unconscionable the preclusion of a right antithetical to the goals of arbitration as envisioned by the FAA (*AT&T Mobility LLC* at 1749-1750 [California law which held that contracts which precluded class action suits were unconscionable could not preclude arbitration of claims even though the agreement itself violated California law by mandating arbitration and precluding class action suits]).

Respectfully, the dissent reaches its conclusion the only way it can, by prematurely determining, absent a motion for such relief, that this suit and the claims asserted do not merit class action certification and then by failing to recognize that this case raises an issue never previously addressed by New York law.

First, where the defendants shortly after being served with the summons and complaint, in lieu of serving an answer, moved to dismiss it plaintiffs have not yet moved for class action

certification pursuant to CPLR §902[3] and it is thus wholly improper, and in fact impermissible, for us to offer any opinion with respect to whether class certification will ultimately be or ought to be granted. Accordingly, whether class certification will be denied should not play any role in the determination of this appeal. Moreover, whether the claims here qualify for class certification is an argument notably absent from any of the briefs submitted on appeal and we should therefore refrain from proffering any opinion on this issue (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]).

Second, like the dissent, we acknowledge this State's strong preference for compelling arbitration when parties expressly agree to arbitrate. Where we part ways, however, is in the dissent's failure to recognize that this is a case of first

[3] CPLR §902 states that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it [the class action] is to be so maintained . . . The action may be maintained as a class action only if the court finds that the prerequisites under 901 have been satisfied."

impression, such that cases like *Harris* and *State of New York v Phillip Morris Inc.* (308 AD2d 57 [2003], *lv denied* 1 NY3d 502 [2003]), which indeed compelled arbitration despite the existence of plenary class action suits, cannot control the outcome. Simply restated, in these cases there existed no agreement precluding arbitration if claims were brought via class action. Here, by contrast, we have an agreement precluding arbitration if otherwise arbitrable claims are brought via class action. As such, until such time as class certification is denied, we cannot compel arbitration (*Velez* at 446-447; *Olde Discount Corp.* at 1271).

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 13, 2011, which denied defendants' motion to dismiss the complaint or, in the alternative, to compel arbitration and stay the action pending arbitration, should be affirmed, with costs.

All concur except Sweeny and Renwick, JJ. who dissent in part in an Opinion by Sweeny, J.

SWEENY, J. (dissenting in part)

I agree with the majority that the doctrine of *res judicata* has no applicability in this case, as the Federal District Court made no determination regarding the merits of the state law claims. Where we part company is on the question of whether plaintiffs may properly assert their claims as a class action. It is abundantly clear from the record that plaintiffs are attempting, as they did in their federal court action, to improperly utilize the vehicle of a class action to avoid their written agreement to arbitrate their claims. I must therefore dissent.

The facts of this case are essentially not in dispute. Plaintiffs, former registered representatives at defendant securities firm which consists of approximately 50 associates, were commission-only retail stock brokers who claim they are owed overtime wages and other compensation from defendants. Plaintiffs are registered with the Financial Industry Regulatory Authority (FINRA), a self-regulatory agency under the U.S. Securities and Exchange Commission. All registered securities representatives, including the named and putative plaintiffs, must sign a Uniform Application for Securities Industry

Registration or Transfer, known as a Form U-4.[1] Section 15A[5] of this form provides, in pertinent part:

> "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules . . . of [FINRA] as may be amended from time to time . . ."

FINRA Rule 13200[a] provides that "except as otherwise provided in the Code [of Arbitration Procedure for Industry Disputes - Rule 13100(f)], a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associate person and is between or among: Members; Members and Associated Persons; or Associated Persons." FINRA Rule 13204 excludes class actions from the requirement of mandatory arbitration of disputes.

On or about April 27, 2010, plaintiffs Gomez and Gabiam commenced an action against defendants in the United States District Court for the Southern District of New York, combining state claims identical to those brought here, and a federal claim for overtime pay under the Fair Labor Standards Act (FLSA). The FLSA claim was the sole basis of federal jurisdiction and was brought as a "collective action" pursuant to FLSA § 16(b) [29 USC § 216(b)], on behalf of all Brill employees employed as

[1]There is no dispute that all parties are members of FINRA and that its rules are incorporated by reference in Form U-4.

stockbrokers in New York during the three years preceding the commencement of the action. The accompanying state claims were brought as a class action.

Defendants moved to dismiss the federal action or, alternatively, to compel arbitration of the FLSA claim and either dismiss the state law claims by declining jurisdiction or stay the state law claims pending resolution of the arbitration. Plaintiffs opposed the motion, arguing that FINRA's restriction against compelling arbitration of class actions extended to their FLSA collective action claim, especially since the state and federal claims were "virtually identical," and if forced to arbitrate their federal claim, they would "be barred by the principles of collateral estoppel from being part of the state class action."

The District Court granted defendants' motion to compel arbitration of the FLSA claim and stayed the action pending resolution of such arbitration, finding that the FLSA collective action was not a "class action" for purposes of FINRA Rule 13204 and thus, was required to be arbitrated pursuant to the provisions of the Form U-4. Significantly, the court rejected plaintiffs' argument that compelling arbitration of the FLSA claim would interfere with their state law claims which were "virtually identical," holding in pertinent part:

> "[T]he Court rejects this attempt to circumvent the arbitration of plaintiffs' FLSA claim . . . finding that to hold otherwise would allow plaintiffs to avoid arbitration and litigate in federal court so long as their FLSA claim may also be styled as a state law class action claim . . . Such an outcome is inconsistent with plaintiffs' obligations under the Form U-4 and the FINRA rules incorporated therein."

(*Gomez v Brill Secs.*, 2010 WL 4455827, *2, 2010 U.S. Dis. LEXIS 118162, *5 [SDNY 2010]).

Thereafter, plaintiffs voluntarily discontinued the federal action without prejudice, stipulating that any FLSA claims brought in the future would be subject to arbitration. They then filed the present action via a class action complaint. The parties to this action are identical to those in the federal action with the exception of an additional plaintiff, Kwesi Moore, and the complaint alleges essentially identical causes of action as those alleged in the state law claims in their federal complaint.

The District Court's reasoning that plaintiffs' claims were a not so subtle attempt to circumvent the arbitration provisions of the Form U-4 and FINRA Rules is compelling and equally applicable here. The result should be the same.

An appropriate starting point would be a review of the role arbitration plays in the judicial system.

There is a strong public policy "supporting arbitration and discouraging judicial interference with either the process or its outcome" (*Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 110, AFL-CIO*, 99 NY2d 1, 6 [2002]), particularly when used as a means of settling labor disputes (*see Matter of Town of Haverstraw [Rockland County Patrolmen's Benevolent Assn.]*, 65 NY2d 677, 678 [1985]; *Matter of Associated. Teachers of Huntington v Board of Educ, Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 229, 236 [1973]).

There is no question, and the plaintiffs do not challenge the validity of the arbitration provisions of the FINRA Rules as incorporated into Form U-4. Rather, plaintiffs follow the same play book as used in the federal court by casting their complaint as a class action in order to avoid their obligation to arbitrate under the provisions of the FINRA Rules to which they agreed.

The fact that there are multiple plaintiffs and potential plaintiffs does not prevent these issues from being arbitrated. FINRA Rule 13312 permits multiple claimants to participate in a

single arbitration.[2] Thus, FINRA provides an appropriate forum to hear plaintiffs' claims in an expeditious manner, before an arbitrator who has expertise in the securities industry. Given the limited size of this class, there is no justification to argue the class action method is superior to other methods of adjudication under CPLR 901(a)(5), as will be discussed infra.

The majority makes the curious argument that the federal court, by staying the state law claims, implicitly found those claims to be outside the scope of arbitration. There is nothing in the record to support this assumption. Although not directly referenced by the federal court in its decision, the Federal Arbitration Act (9 USCS § 3) mandates a stay of the trial of any causes of action, pending completion of arbitration on any other cause of action.[3] As noted, the federal court found that

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[2] FINRA Rule 13312[a] (formerly NASD Rule 13312[a]) provides: "One or more parties may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and:

"• The claims assert any right to relief jointly and severally; or

"• The claims arise out of the same transaction or occurrence, or series of transactions or occurrences."

[3] 9 USCS § 3 provides as follows:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . upon being satisfied that the issue involved in such suit or proceeding

plaintiffs' use of the federal procedural vehicle of a "collective action" was essentially an attempt to avoid its obligations to arbitrate their claims. In holding the FLSA claims to be arbitrable, the court was required to stay the state court claims. No determination was made or inferred with respect to the arbitrability of these claims, despite the fact that plaintiffs argued in the federal action that their FLSA and state claims were "virtually identical." The result, as the majority rightfully determined, was that defendants' argument that this action is precluded by the doctrine of res judicata is unavailing.

An examination of the statutory requirements for a proper class action is also in order.

CPLR 901(a) sets forth criteria which a court must consider in certifying a class action:

> "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> "2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

> is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . ." (emphasis added).

> "3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> "4. the representative parties will fairly and adequately protect the interests of the class; and
> "5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The party moving for class action certification has the burden of satisfying all five criteria (*Godwin Realty Assoc. v CATV Enters., Inc.*, 275 AD2d 269 [2000]). Although these statutory criteria should be liberally construed (*Englade v HarperCollins Publs, Inc.*, 289 AD2d 159 [2001]), such construction should not be utilized as a license to evade contractual obligations to arbitrate disputes (*see* 82 NY Jur 2d, Parties, § 247; *Harris v Shearson Hayden Stone,* 82 AD2d 87, 91 [1981], *affd* 56 NY2d 627 [1982]).

Here, although plaintiffs arguably meet the numerosity requirement of CPLR 901(a)(1) (*see e.g., Gilbert v Hamilton*, 35 AD2d 715 [1970], *affd* 29 NY2d 842 [1971]) where we held that an action for the equitable dissolution of a corporation could be maintained as a class action even though the plaintiff class consisted of only five persons, they certainly do not meet the requirements of CPLR 901(a)(5). The purported class action is clearly not superior to any other available methods of fairly and efficiently resolving this controversy.

The policy of this State "favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). Given the limited size of this class and the issues involved, there is no justification to argue the class action method is superior to other methods of adjudication. This purported class action does not further judicial economy, particularly since, as noted, FINRA Rules provide for the arbitration of multiple party claims. Because plaintiffs do not meet the requirement of CPLR 901(a)(5), class action certification must be denied (*see Geiger v American Tobacco Co.*, 277 AD2d 420, 421 [2000], *lv dismissed* 86 NY2d 754 [2001]).

Most importantly, the majority overlooks the fact that CPLR Article 9 is merely a procedural provision designed as a method of enforcing substantive law. By contrast, CPLR Article 75 is substantive law, particularly because arbitration is rooted in contract law.

State of New York v Philip Morris, Inc. (308 AD2d 57, 67 [2003], *lv denied* 1 NY3d 502 [2002]) is instructive in this regard. In reversing the motion court's determination to grant class action certification, we held that the order in question

> "rests on the assumption that, if CPLR Articles 9 and 75 conflict, the former trumps the latter. However, that assumption is incorrect. In *Harris v Shearson Hayden Stone* (citation omitted), this Court held that 'the interests favoring arbitration should prevail over those favoring the class action, both in general and in the present instance'" (308 AD2d at 67).

Although, as the majority notes, *Harris* was decided prior to the advent of FINRA and its predecessor National Association of Securities Dealers (NASD), its rationale is still applicable under the circumstances of this case. *Harris* specifically found that, in a conflict between a purported class action and a valid arbitration agreement, the "strong public policy which underlies arbitration" must prevail (82 AD2d at 92). While it is true that FINRA's exception for class actions was not involved in *Harris*, the principle that class actions are procedural vehicles to enforce the substantive law is unchanged. Indeed, *Harris*, in quoting from *Vernon v Drexel Burnham & Co.* (52 Cal App 3d 706, 716 [1975]) astutely observed that "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends - to sacrifice the goal for the going" (82 AD2d at 95). In effect, the majority is doing just that - substituting a procedural device in place of a substantive one.

This rationale is particularly applicable here. A basic reading of the four corners of the Form U-4 and the FINRA rules

leads to the conclusion that the claims being asserted by plaintiffs are arbitrable. Simply styling a complaint as a class action in order to bring it within an exception to arbitration elevates form over substance and essentially negates the strong public policy in favor of arbitration as stated in *Harris* and a legion of other cases. Plaintiffs are merely utilizing the procedural device of a class action to circumvent their obligations under substantive contractual law to arbitrate their overtime claims. Having been thwarted at the federal level, they are now attempting to pull off the same charade in state court. As in the federal court, such an attempt should not be permitted.

If these plaintiffs are permitted to evade their obligations under Form U-4 and the FINRA Rules by getting a few other potential plaintiffs to sign on to their complaint and thus refer to themselves as a "class," other plaintiffs could and would follow suit with other issues covered by FINRA Rules and Form U-4. This would completely eviscerate the purpose of the arbitration rules and create litigation in cases which should be, and have been, the subject of mandatory arbitration. This not only runs afoul of the intent of FINRA Rules, but also negates

the requirements of CPLR 901(a). In short, the majority is throwing open the floodgates of litigation in the securities industry, as well as potentially creating an unwarranted exception to other validly enforceable arbitration agreements. There is no basis for doing so.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5388-
5389 In re The New York County Lawyers' Association, et al.,
Petitioners-Appellants,

The New York Criminal Bar Association, Inc., et al.,
Intervenors-Petitioners-Appellants,

-against-

Michael R. Bloomberg, etc., et al.,
Respondents-Respondents,

The Legal Aid Society of New York,
Intervenor-Respondent-Respondent.

Index 107216/10

Haynes and Boone, LLP, New York (Jonathan D. Pressment of counsel), for the New York County Lawyers' Association, the Bronx County Bar Association, the Brooklyn Bar Association, the Queens County Bar Association, the Richmond County Bar Association, appellants.

Satterlee Stephens Burke & Burke LLP, New York (Zoë E. Jasper of counsel), for The New York Criminal Bar Association, Inc. and Anastasios Sarikas, appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for Michael R. Bloomberg, The City of New York and John Feinblatt, respondents.

Davis Polk & Wardwell LLP, New York (Daniel F. Kolb of counsel), for The Legal Aid Society, respondent.

Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered January 19, 2011, affirmed, without costs.

Opinion by Andrias, J. All concur except Mazzarelli, J.P. and Abdus-Salaam, J. who dissent in an Opinion by Abdus-Salaam, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Karla Moskowitz
Rosalyn H. Richter
Sheila Abdus-Salaam, JJ.

5388-
5389
Index 107216/10

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In re The New York County Lawyers' Association, et al.,
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The New York Criminal Bar Association, Inc., et al.,
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-against-

Michael R. Bloomberg, etc., et al.,
Respondents-Respondents,

The Legal Aid Society of New York,
Intervenor-Respondent-Respondent.

_____x

Petitioners appeal from an order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered January 19, 2011, which, to the extent appealed from as limited by the briefs, denied the petition and granted respondents' cross motion for summary judgment dismissing this proceeding brought pursuant to CPLR article 78 insofar as it challenges respondent the City of New York's Indigent Defense Plan (43 RCNY 13-01 to 13-05).

Haynes and Boone, LLP, New York (Jonathan D. Pressment, David M. Siegal and Kendyl T. Hanks of counsel), for the New York County Lawyers' Association, the Bronx County Bar Association, the Brooklyn Bar Association, the Queens County Bar Association, the Richmond County Bar Association, appellants.

Satterlee Stephens Burke & Burke LLP, New York (Zoë E. Jasper and Alun W. Griffiths of counsel), for The New York Criminal Bar Association, Inc. and Anastasios Sarikas, appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein, Larry A. Sonnenshein and Thaddeus Hackworth of counsel), for Michael R. Bloomberg, The City of New York and John Feinblatt, respondents.

Davis Polk & Wardwell LLP, New York (Daniel F. Kolb, Daniel J. O'Neill and Jennifer Marcovitz of counsel), for The Legal Aid Society, respondent.

ANDRIAS, J.

In this article 78 proceeding, we are called upon to judge the legality, not the wisdom or the prudence, of the City of New York's proposed revisions to its Indigent Defense Plan with respect to the assignment of counsel in cases in which the initial provider at arraignment is unable to represent the indigent person due to a conflict of interest. Upon our review of the record and relevant statutes, we conclude that the City's revised plan, and its proposed implementation pursuant to Chapter 13 of Title 43 of the Rules of the City of New York (43 RCNY 13-01 *et seq*.), is not arbitrary and capricious or irrational (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]), does not require the consent of the county bar associations (the County Bars), and does not violate section 722 of article 18-B of the County Law (as amended by L 2010, ch 56, pt E, § 3) or Municipal Home Rule Law § 11(1)(e).

The revised plan is a lawful "combination" plan under County Law § 722(4), providing indigent representation under the "private legal aid bureau or society" option of § 722(2), which, contrary to petitioner's contention, is not restricted to primary assignments, and the "plan of a bar association" option of

§ 722(3), which, contrary to petitioner's contention, does not give the County Bars the exclusive right to provide "conflict counsel." Although the revised plan provides for the assignment of conflict cases to institutional providers under § 722(2), it continues to permit the assignment of conflict cases to private counsel serving on Criminal Defense Panels (see 43 RCNY 13-03) created under the authority of Executive Order 178 of 1965 and pursuant to the 1965 "Bar Plan," to be administered in accordance with the rules of the Appellate Division, First and Second Departments (Executive Order 136 of 2010), and does not improperly usurp the role of the County Bars. Nor does the plan either eliminate the judiciary's right under County Law § 722(4) to assign counsel when a conflict of interest prevents assignment pursuant to the plan or displace the judiciary's role in authorizing the appointment of experts (*see* 43 RCNY 13-05).

County Law § 722

In 1965, in response to the United States Supreme Court decision in *Gideon v Wainwright* (372 US 335 [1963]) and the Court of Appeals decision in *People v Witenski* (15 NY2d 392 [1965]), New York State enacted article 18-B of the County Law (§ 722 *et seq.*) (L 1965, ch 878), which provided, "[T]he board of

supervisors of each county[1] and the governing body of the city in which a county is wholly contained shall place in operation . . . a plan for providing counsel to persons charged with crime . . . who are financially unable to obtain counsel" (sec 1, § 722). The county or city was given four options for providing such counsel: representation by (1) "a public defender appointed pursuant to county law article [18-A]"; (2) "counsel furnished by a private legal aid bureau or society"; (3) "counsel furnished pursuant to a plan of a bar association . . . whereby the services of private counsel are rotated and coordinated by an administrator," or (4) "according to a plan containing a combination of any of the foregoing" (L 1965, ch 878, sec 1, § 722[1]-[4]). On June 22, 2010, County Law § 722(3) was amended to add an "office of the conflict defender" option:

> "3.(a) Representation by counsel furnished pursuant to *either or both of the following*: a plan of a bar association in each county or the city in which a county is wholly contained whereby: *(i)* the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service; *or (ii)*

[1] Later changed to "governing body" (L 1975, ch 682, § 10).

> *such representation is provided by an office of conflict defender*" (L 2010, ch 56, pt E § 3) (amendments in italics).[2]

County Law § 722(4) also provides that if the county or city does not have a plan conforming to option 3 or 4 and the court is satisfied that "a conflict of interest prevents the assignment of counsel pursuant to the plan in operation, or when the county or the city . . . has not placed in operation any plan conforming to that prescribed in this section, the [court] may assign any attorney," and that attorney will receive compensation pursuant to article 18-B.

The Evolution of the City's Indigent Defense Plan

On November 27, 1965, then Mayor Robert Wagner issued Executive Order 178, which, in conjunction with the joint plan of the Association of the Bar of the City of New York and the New

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[2] The syntax of this provision, with its use of two colons, is somewhat confusing. It would appear that the second colon should not have been included and that the "(i)" that appears in the fourth line after it should have been placed after the phrase "pursuant to either of both of the following:" and before the phrase "a plan of a bar association." However, even if the amendment as drafted was intended to require County Bar approval of a plan employing the newly created option of an office of conflict defender, it would not alter our determination that the City's revised Indigent Defense Plan is a valid § 722(4) combination plan. The revised plan does not call for the creation of an office of conflict defender, and § 722(3) does not provide the exclusive means for appointing conflict counsel.

York County Lawyers' Association (the 1965 Bar Plan) that was approved by resolution of the City Council on April 28, 1966, established a County Law § 722(4) combination plan employing the § 722(2) and § 722(3) options. For the § 722(2) component, the Legal Aid Society (LAS) was designated as the primary provider for persons charged with crimes within the City who were determined by a court to be entitled to representation under Article 18-B. For the § 722(3) component, when a court deemed that counsel other than LAS was required because of either a conflict of interest or other good cause, or because the crime charged was punishable by death or life imprisonment, representation was to be provided from a panel of private lawyers identified by the County Bars and screened by committees in which the County Bars played a role.

On January 6, 2010, Title 43 of the Rules of the City of New York was amended, effective February 5, 2010, to add Chapter 13 (43 RCNY 13-01 *et seq*.), entitled, "Indigent Defense Plan for the City of New York." Note 1 to § 13-01 explains:

> "The most recently promulgated Plan was published on November 27, 1965, in Executive Order Number 178: Furnishing of Counsel to Indigent Criminal Defendants Within the City of New York ("1965 Plan"). In the intervening forty-three years, *the City has made several changes* in the procedures

> governing the provision of indigent defense in order to ensure that the highest quality representation is provided to indigent defendants, and that the most advantageous arrangement for the City is implemented. In order to bring the Plan into conformity with current practice, this rulemaking is necessary" (emphasis added).

While LAS is still the primary institutional provider, one of these "changes" occurred in 1996, when the City began contracting with other institutional providers to provide indigent legal services pursuant to County Law § 722(2). New sections of the Appellate Division rules approved by the County Bars had also been adopted in 1980 by the First and Second Departments whereby committees designated by the Appellate Division would perform the function of screening attorneys for the Criminal Defense Panels (*see* 22 NYCRR 612.0 *et seq.*; 22 NYCRR § 678.1 *et seq*.).

Accordingly, 43 RCNY 13-02 addresses the procurement of institutional providers. 42 RCNY 13-03 addresses the assignment of counsel at the trial and appellate levels in criminal matters, providing in part:

> "In any case where, due to conflict of interest or other appropriate reason, Providers decline or are unable to represent an indigent person at the trial or on appeal in a criminal matter, counsel shall be furnished by attorneys assigned by the ACP

> [Assigned Counsel Plan] from the appropriate Criminal Defense Panel of the Appellate Division, First or Second Judicial Department, or by alternate providers selected by the CJC [Office of the Criminal Justice Coordinator] through the City's procurement process."

The Criminal Defense Panels are to be managed by the newly created Office of Assigned Counsel Plan (OACP), which is overseen by two administrators in consultation with the Presiding Justices of the First and Second Departments and administered in accordance with the rules of those courts (43 RCNY 13-01).

43 RCNY 13-04 addresses the assignment of counsel at the trial and appellate levels in family law matters. 43 RCNY 13-05 addresses the appointment of experts in matters handled by panel members. 43 RCNY 13-06 sets forth payment procedures in criminal matters handled by attorneys on Criminal Defense Panels and experts assigned to those matters. These include submitting vouchers to the OACP "for review prior to payment by the comptroller."

Pursuant to Chapter 13, on February 3, 2010, the City issued a request for proposals (RFP) inviting bids by private institutional vendors for the provision of indigent criminal defense services and for the assignment of conflict cases. Noting that seven organizations provided trial-level services in

New York City and that the City expected to award at least one more contract in each county, the RFP stated that "the City is interested in providing representation in conflict cases and anticipates issuing awards to vendors who propose to provide representation in conflict cases." A February 8, 2010 addendum corrected a statement in the RFP that "[t]here will be at least 2 institutional providers in each county who will provide both primary and conflict representation," stating that "[t]he City has not decided and the RFP does not state that a definite number of providers will be selected for each county."

On March 2, 2010, the Mayor issued Executive Order 132, which repealed Executive Order 178, but stated that "Criminal Defense Panels created under the authority of Executive Order 178 . . . shall continue to exist and shall be administered in accordance with the rules of the Appellate Division, First and Second Judicial Departments." However, a March 2, 2010 addendum to the RFP stated that the City's plan for indigent legal services as set forth in Executive Order 132 provided for a "private legal aid bureau or society" option in conformity with County Law § 722(2), and that the prior § 722(3) bar association option is "no longer in effect." Faced with the prospect of Criminal Defense Panel attorneys losing their position as the

sole provider of conflict representation, in June 2010, petitioners filed this proceeding challenging Executive Order 132, the February 3, 2010 RFP, as amended, and Chapter 13 as violative of, among other things, County Law § 722 and Municipal Home Rule Law § 11(1)(e).

On June 13, 2008, the Mayor had issued Executive Order 118, which repealed Executive Order 178, but continued the Criminal Defense Panels, stating that in conflict cases "counsel shall be furnished by attorneys assigned by the ACP from the appropriate Criminal Defense Panel of the Appellate Division, First or Second Judicial Department." On July 13, 2010, the Mayor issued Executive Order 136, which repealed Executive Orders 132 and 118. Executive Order 136 also repealed Executive Order 178,

> "except that the Criminal Defense Panels created under the authority of Executive Order 178 of 1965 and pursuant to the plan submitted by bar associations in accordance with subdivision 3 of section 722 of the County Law shall continue to exist and shall be administered in accordance with the rules of the Appellate Division, First and Second Departments."

Executive Order 136 thus retained the 1965 Bar Plan Panels, which, along with institutional providers, would be available to serve as conflict counsel under the City's revised County Law § 722(4) combination plan.

In response to Executive Order 136, petitioners amended their pleading, seeking a direction that respondents "continue the current provision of indigent defense services under the 1965 Bar Plan, unless and until a constitutional and statutorily compliant alternate system is established." Petitioners also asked the court to declare that "any contracts entered into by Respondents . . . pursuant to Chapter 13, Executive Order 136 or the RFP are invalid to the extent they do not comply with all provisions of Article 18-B and the 1965 Bar Plan," and moved for an order enjoining respondents "from executing, entering into or renewing any contracts with respect to conflict [cases] . . . without first obtaining the consent of the County Bars."

Analysis

"As a matter of statutory construction, a court must attempt to effectuate the intent of the Legislature and where the terms of a statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 442-443 [2011] [internal quotation marks, alterations and citations omitted]). "A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed

together to determine the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 97, *quoting Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 691 [2006]). A construction "resulting in the nullification of one part of the [statute] by another [] is impermissible" (*Rangolan v County of Nassau*, 96 NY2d 42, 48 [2001]) and "[a] construction rendering statutory language superfluous is to be avoided" *(Matter of Branford House v Michetti*, 81 NY2d 681, 688 [1993]; see *also Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587 [1998]).

In enacting article 18-B of the County Law, the Legislature unambiguously placed the responsibility for implementing an Indigent Defense Plan on the county or city, not on the County Bars, by stating: "The [governing body] of each county and the governing body of the city in which a county is wholly contained *shall* place in operation throughout the county a plan for providing counsel" to indigent persons charged with a crime (§ 722 [emphasis added]). The Legislature also gave the county or city, not the County Bars, the sole discretion to select the components of the plan, provided that the plan conformed to one of four statutory options set forth in § 722(1)-(4) (*see Goehler v Cortland County*, 70 AD3d 57, 60 [2009]). Exercising this discretion, the City did not violate County Law § 722 or

Municipal Home Rule Law § 11(1)(e) when, without the consent of the County Bars, it opted to employ a § 722(4) combination plan that appointed conflict defenders from either institutional providers selected by the CJC through the City's procurement process, pursuant to § 722(2), or from the existing Criminal Defense Panels, pursuant to § 722(3).

Even if the practical effect of the revised plan will be to reduce the number of conflict cases assigned to 18-B attorneys, the revised plan does not eliminate the participation of private attorneys through Criminal Defense Panels appointed by the First and Second Departments upon the recommendation of screening or advisory committees established under rules of those courts. Rather, recognizing that LAS has not been the sole institutional provider of indigent defense services since 1996, the revised plan rationally supplements the original 1965 plan by providing that where one institutional provider declines or is unable to represent an indigent person due to a conflict of interest, representation shall be provided by an attorney assigned from a Criminal Defense Panel under § 722(3) or by an alternate institutional provider under § 722(2) (*see* 43 RCNY 13-03). Thus, as stated by Judge Batts in *New York County Lawyers Assn v Bloomberg* (2011 WL 4444185, *5, *6, 2011 US Dist. LEXIS 112929,

*15, *16 [SD NY 2011]), in which the County Bars challenged the constitutionality of the City's revised plan:

> "[T]he only actual change to the City's indigent defense system is that conflict cases are no longer automatically assigned to the 1965 Bar Plan Panels. . . . Aside from the aforementioned change regarding the automatic assignment of conflict cases, Executive Order 136 does not purport to make any changes to the rights and responsibilities of the County Bars with respect to the administration of the 1965 Bar Plan Panels."

The dissent disagrees and postulates that the revised plan is not a valid combination plan because the City did not have the discretion to implement, without the participation and approval of the County Bars, *the revisions to* the original County Law § 722(3) component, which (according to the dissent) materially deviate from the original 1965 Bar Plan. The dissent believes that the revised plan materially differs from the 1965 Bar Plan because it removes the County Bars from their roles as the managers and administrators of the Bar Plan Panels in favor of the OACP. However, the 1965 Bar Plan assigned those duties to an administrator appointed by the Appellate Divisions and paid by the City. OACP is "overseen by two Administrators in consultation with the Presiding Justices of the First and Second Judicial Departments" (43 RCNY 13-01) and takes no authority away

from the County Bars.[3] With respect to representation by private counsel, the revised plan uses the same bar plan that has been in place since 1965, with the long-standing modifications by the Appellate Divisions that the County Bars approved (*see* 22 NYCRR 612.0 *et seq.* and 22 NYCRR § 678.1 *et seq*.). 18-B Panel attorneys will continue to be assigned by the courts as counsel for indigent defendants and will be organized in Criminal Defense Panels managed and screened as agreed by the County Bars, thereby ensuring that cases will be assigned to qualified and accountable attorneys, without favoritism or nepotism, when the bar plan option is invoked. We note that the most serious criminal matters, homicide cases, will continue to be assigned to experienced 18-B Panel attorneys.

Neither the language of the statute nor its tenor supports the dissent's view that County Law § 722(2) applies to primary assignments only. The statute provides for "representation [in criminal proceedings] by counsel furnished by a private legal aid

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[3] Supreme Court held that 43 RCNY 13-06, which sets forth procedures for the payment of attorneys on Criminal Defense Panels and experts who render services in Criminal Court, violates County Law §§ 722-b and 722-c and the Municipal Home Rule Law. Accordingly, it granted petitioners' request for injunctive relief to the extent of permanently enjoining the City from reviewing vouchers pursuant to 43 RCNY 13-06.

bureau or society designated by the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel." This unambiguous language does not distinguish between primary and conflict assignments and does not impose any restraints on the City with respect to the types or number of cases that it may assign to qualified institutional providers. Thus, as Supreme Court found, where one legal aid bureau or society has a conflict, under § 722(2) the case may be assigned to another legal aid bureau or society that has no conflict or does not otherwise decline the representation.[4] The City has been contracting with multiple institutional providers to provide indigent legal services pursuant to County Law § 722(2) since 1996, and the limitations period for challenging the City's right to do so has long expired.

Nor is there any language in County Law § 722 that obligates a county or city to obtain the County Bar's approval should it

[4] Of course, as the City stated at the argument of this appeal, there would be no restriction on continuing to assign conflict cases to the 18-B Panel lawyers just because an institutional provider took the initial conflict assignments on certain arraignment shifts or days.

elect to include a § 722(2) option in an indigent defense plan that encompasses conflict cases. Indeed, as a matter of discretion, a county or city may adopt a plan that employs the § 722(2) option alone, subject only to the condition that when "a conflict of interest prevents the assignment of counsel pursuant to the plan in operation," the assigning judge "may assign any attorney in such county or city" (County Law § 722[4]). For example, under a § 722(2) plan, the first defendant in a multiple-defendant matter could be assigned to LAS, the second to another institutional provider, and the third to an attorney appointed by the court.

The June 2010 amendment to County Law § 722(3) does not give the County Bars the exclusive right to provide conflict counsel. The amendment, adopted in response to *Goehler v Cortland County*, (70 AD3d 57 [2009], *supra*), authorizes the use of "an office of conflict defender" as a permissible option, but does not deprive the City of its discretion to formulate a plan of its choosing for the distribution of cases involving indigent defendants, so long as the plan is based on one of the four options set forth in County Law § 722(1)-(4).[5] As the sponsor's memo regarding the

[5] In *Goehler*, a local plan that created an office of conflict attorney appointed by the County Legislature was invalidated

original Assembly Bill that became L 2010, ch 56, pt E, §3 indicates, the amendment was first contemplated to authorize "counties to create an office of conflict defender in order to provide representation to indigent defendants who qualify for representation by the public defender's office, but who cannot be represented by the public defender due to the public defender's conflict of interest" (found in Lexis at 2009 Legis Bill Hist NY AB 9706, Part F, at 9). Nor is there any language in the amended subdivision that would indicate that the amendment was intended to limit the City's ability to assign conflict cases to institutional providers pursuant to § 722(2).

Indeed, as Supreme Court observed, a construction of County Law § 722 that would give exclusively to the County Bars the role of providing conflict counsel would obligate the City to include a § 722(3) option in its Indigent Defense Plan, which would impermissibly render meaningless the choice given to the City under § 722(4) of implementing a plan using a combination of any of the other three alternatives in § 722. For example, under the

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because no such option was authorized by County Law § 722. In contrast, Chapter 13 of Title 43 of the Rules of the City of New York merely rearranges how the City chooses to administer its Indigent Defense Plan; it not does not seek to employ an unauthorized option.

unambiguous language of the statute, a county or city, as a matter of discretion, may lawfully formulate a combination plan under County Law § 722(4) that employs the public defender option of § 722(1) and a legal aid option of § 722(2), without any involvement of the County Bars under § 722(3). In this scenario, the public defender's office could act as the primary indigent defender, with conflict assignments given to a legal aid society or societies. An interpretation of the statute that would make a bar plan under § 722(3) the sole mechanism for conflict defense would impermissibly preclude the City from exercising this option and would be tantamount to impermissible judicial legislation (*see People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]), granting the County Bars the unbridled power to veto any attempt by the City to revise its Indigent Defense Plan, as well as a monopoly in the assignment of conflict cases, that is not supported by the text, purpose, or legislative history of article 18-B. If the Legislature had wished to exclude conflict representation from the ambit of § 722(2) and to designate private attorneys from Criminal Defense Panels as the exclusive conflict defenders pursuant to § 722(3), it would have included

language to that effect in the statute.[6]

The dissent also states that the revised plan impermissibly transfers the authority to decide whether a conflict of interest

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[6] In this regard, we note that a bill was presented to the State Assembly (A6561) on March 21, 2011 and to the State Senate (S5421) on May 19, 2011 seeking to amend County Law § 722(2) and (3)(a) to "clarify language to provide for indigent criminal conflict cases." This proposed amendment, designed to grant petitioners the very relief they seek in this proceeding, states:

> "2. *Notwithstanding any other provision of this article, representation in all criminal conflict cases shall be furnished by private counsel duly certified as qualified in accordance with paragraph (a) of subdivision three of this section except in any county operating an office of conflict defender as described in paragraph (c) of subdivision three of this section. In any multiple defendant case representation to one defendant shall be furnished by one legal aid bureau or society, or one other provider designated to the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel; all other defendants in the same case shall be considered conflict cases and representation shall be provided by private counsel duly certified as qualified in accordance with paragraph (a) of subdivision three of this section except in any county operating an office of conflict defender as described in paragraph (c) of subdivision three of this section.*
>
> "[3](a) Representation by counsel furnished pursuant to either or both of the following: a plan of a bar association in each county *or a bar association of* the city in which a county is wholly contained whereby: (i) the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service; or (ii) such representation is provided by an office of conflict defender" (proposed amendments in italics).

exists from the judiciary to the institutional provider. However, while the 1965 Bar Plan provides that the court will appoint counsel from the appropriate panel where it "deems the assignment to be required in the interest of justice because of ... a conflict of interest," it does not state that it is for the court, rather than counsel, to determine whether a conflict exists.[7] In practice, it is the provider or attorney that has the ethical duty to determine whether a conflict of interest exists (see Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.7-1.10). Consistent with this, Executive Order 178 stated: "In those cases where by reason of a conflict of interest or other appropriate reason . . . *the Legal Aid Society declines to represent [an indigent] defendant*, such defendant shall be represented by counsel furnished pursuant to the [1965 Bar Plan]" (emphasis added). In similar fashion, recognizing that there are now multiple institutional providers, 43 RCNY 13-03 provides that where one institutional provider declines or is unable to represent an indigent person due to a conflict of interest,

[7] In contrast, the plan provides that "[u]nder this plan, *whenever a determination has been made by a court* that a defendant is entitled to representation under Article 18-B of the County Law, the court shall designate and appoint [LAS] as the attorney of record for the defendant in all cases, unless . . ." (emphasis added).

“counsel shall be furnished by attorneys assigned” from a Criminal Defense Panel, pursuant to § 722(3), “or by alternate providers,” pursuant to § 722(2).

Based on its belief that there is no valid plan of the bar association, the dissent in effect states that the revised plan is a County Law § 722(2) legal aid bureau plan, not a § 722(4) combination plan. It then finds that the revised plan is invalid because it “bypass[es] all judicial involvement in the appointment of conflict counsel” as required by County Law § 722(4), and impermissibly crafts an alternative option in violation of Municipal Home Rule Law § 11.

A court’s authority to appoint conflict counsel under § 722(4) exists only when the indigent defense plan is not a combination plan or a § 722(3) plan. As detailed above, the City’s revised plan is a valid § 722(4) combination plan, comprised of the § 722(2) and § 722(3) options. However, even assuming for the purpose of argument that the revised plan must be analyzed as a § 722(2) plan, the dissent’s § 722(4) analysis is flawed in that it ignores critical language of the statute.

Section 722(4) provides that where a county or city does not have a valid § 722(4) or § 722(3) plan, the court *may* assign *any* attorney only where it finds that "a conflict of interest

prevents the assignment of counsel pursuant to the plan in operation" (County Law § 722[4] [emphasis added]). By virtue of this language, the court's authority to appoint conflict counsel comes into play only when there is no method of resolving conflicts inherent in the plan. In its revised plan, the City has designated multiple institutional providers under § 722(2), with one provider taking primary assignments and the second available to take over those assignments in the event of a conflict.[8] Accordingly, because the plan provides a method whereby the first provider's conflict of interest will not prevent the case from being assigned to a second provider, the court would not be required to exercise its authority under § 722(4) to appoint counsel directly unless both the first and second institutional providers had conflicts. In that event, there is nothing in the revised plan that would prevent the assignment of counsel by the court directly under § 722(4). Furthermore, in that instance, in conformity with past practice,

[8] At oral argument, both the City and LAS stated that under the revised plan 18-B Panel attorneys will continue to take conflict cases on days and/or shifts on which LAS is the primary intake defender and in cases in which there are multiple defendants; LAS will take conflicts only when another institutional defender is the shift or day's primary defender.

the court could, and undoubtedly would, assign counsel from the 18-B Panels.

Finally, petitioners argue that Chapter 13 of Title 43 of the Rules of the City of New York usurps the judge's role in authorizing experts. This ignores the clear language to the contrary in Chapter 13, which specifically provides that "[a]ttorneys representing indigent persons pursuant to this chapter may seek the appointment of an investigator, expert or other service provider pursuant to section 722-c of the County Law" (43 RCNY 13-05), pursuant to which such experts are appointed by the courts.

In concluding that the City's revised plan is a valid County Law § 722(4) combination plan and that it does not violate the letter or spirit of § 722, this Court is not endorsing the plan. It may turn out in practice that the 1965 arrangement (§§ 722[2]-[3]) is far superior to the City's revised plan because of its flexibility and simplicity, whatever its heavy costs. In practice, the new plan may or may not substantially reduce the numerical assignments of 18-B Panel members (*see* footnote 8, supra). If it does, there may be a dramatic number of experienced lawyers dropping off the panels to seek other work, to the obvious detriment of the criminal justice system.

Contrariwise, the City's envisioned efficiencies may not materialize; on its face the new plan would seem to present significant scheduling and logistical issues. Whatever the outcome of the implementation of the City's proposed revised plan, however, the merit or wisdom of the enterprise is not the province of the courts. The question is merely whether the City's new plan meets the statutory criteria of County Law § 722 without doing violence to the essential structure of the 1965 Bar Plan, and we find that it does.

Accordingly, the order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered January 19, 2011, which, to the extent appealed from as limited by the briefs, denied the petition and granted respondents' cross motion for summary judgment dismissing this proceeding brought pursuant to CPLR article 78 insofar as it challenges respondent the City of New York's Indigent Defense Plan (43 RCNY 13-01 to 13-05), should be affirmed, without costs.

All concur except Mazzarelli, J.P. and Abdus-Salaam, J. who dissent in an Opinion by Abdus-Salaam, J.

ABDUS-SALAAM, J. (dissenting)

I respectfully dissent and would grant the petition.

This proceeding challenges the plan of respondents Mayor Bloomberg, his Criminal Justice Coordinator (CJC) and the City of New York to make changes to the indigent defense system in New York City that has been in place since 1965. The core of the dispute is the manner in which the City proposes to assign so-called "conflict cases" - cases in which the primary provider at arraignment (The Legal Aid Society or another legal aid organization) is unable to accept representation due to a conflict of interest. Until recently, conflict defense counsel have been appointed through panels of individual attorneys created and administered by the County Bar Associations, Assigned Counsel Panels commonly referred to as 18-B Panels. However, in January 2010, the City revised Title 43 of the Rules of the City of New York by adding Chapter 13, which provides that in the case of a conflict, counsel may be appointed from either Assigned Counsel Panels or from one of the legal aid providers.

Subsequent to the commencement of this proceeding, through discovery and representations made at oral argument, it has become evident that the City's ultimate goal is to have Legal Aid serve as the primary provider of conflict defense counsel.

Petitioners claim that the City's new plan violates County Law § 722 and Municipal Home Rule Law § 11(1)(e). I agree.

County Law § 722 was originally enacted in 1965. It directed the City to place in operation a plan for providing counsel to persons charged with a crime who are unable to afford their own lawyers. The plan is subject to the requirement that the City provide for legal representation through one of four alternatives set forth in the statute (*see* County Law § 722).

Those alternatives, as they are set forth in the current version of County Law § 722, which was amended in July 2010, are: (1) a public defender; (2) counsel furnished by a private legal aid bureau or society, such as the Legal Aid Society (intervenor-respondent in this proceeding); (3) counsel furnished pursuant to "a plan of a bar association" whereby "the services of private counsel are rotated and coordinated by an administrator" (18-B Panels) or "such representation is provided by an office of conflict defender"; or (4) any combination of the foregoing options (*see* County Law § 722[1]-[4]). The statute further provides, with respect to the appointment of conflict counsel, that where the city has not placed in operation a plan conforming with subdivision (3) or subdivision (4) of County Law § 722 and a judge "is satisfied that a conflict of interest prevents the

assignment of counsel pursuant to the plan in operation," the judge may assign any attorney (§ 722[4]).

In 1965, then-Mayor Wagner issued Executive Order 178, by which the City established an indigent defense plan that was a Combined Option Plan pursuant to County Law § 722(4). In conjunction with the issuance of Executive Order 178, the county bar associations (County Bars) and the Association of the Bar of the City of New York devised the bar plan component (the 1965 Bar Plan) of the Combined Option Plan. Under the Plan, Legal Aid was designated as the primary provider of indigent defense services in the City's criminal courts (pursuant to County Law § 722[2]), and a procedure was established for using panels of private attorneys (18-B Panels) where the court determined that counsel other than Legal Aid was required either because there was a conflict or for any other good cause, or because the crime charged was punishable by death or life imprisonment (pursuant to County Law § 722[3]).

In January 2010, the CJC revised Title 43 of the Rules of the City of New York to add Chapter 13. The new Chapter included a provision that specifically provided for the City's direct appointment of "alternate providers" for the provision of conflict defense services, as "selected by the CJC through the

City's procurement process"(43 RCNY 13-03). Respondents issued a Request for Proposals (RFP) by which the CJC proposed to award contracts for the provision of representation in conflict cases (a role then solely served by the 18-B Panels). Subsequently, the Mayor issued Executive Order 132, which repealed Executive Order 178 (the 1965 order establishing the Indigent Defense Plan) and promulgated a new system for the provision of indigent defense counsel.

Significantly, while Executive Order 132 indicated that respondents intended to continue with the Combined Option Plan, using elements of both County Law §§ 722(2) and 722(3), a Second Addendum to the RFP issued by the CJC contemporaneously with Executive Order 132 indicated to the contrary.[1] The Second Addendum provided, as relevant here:

> "As may be seen, section 722 provides four alternative means that may be chosen by a locality for the provision of indigent legal services. One of those alternatives, set forth in subdivision three, is the adoption of a bar association plan for the rotation of legal services among private counsel. However, the City is in no way required, in formulating its plan for indigent legal services, to conform to the alternative provided in subdivision three.

[1]The City asserts that some of the statements in the Second Addendum were incorrect.

> "The City's current plan for indigent legal services, set forth in Executive Order No. 132, and in chapter 13 of Title 43 of the Rules of the City of New York, conforms to subdivision two of section 722, which provides for legal representation in criminal proceedings by 'a private legal aid bureau or society designated by the [City].' This is entirely in accordance with the requirements of section 722. The City's previous plan for the provision of indigent legal services, explicitly repealed by Executive Order No. 132, relied on services provided pursuant to the plan of a local bar association. *That plan is no longer in effect*" (emphasis added).

Petitioners commenced this proceeding seeking declaratory and injunctive relief pursuant to CPLR article 78 in June 2010. They alleged, among other things, that due to respondents' abandonment of the 1965 Bar Plan and decision to rely solely on County Law § 722(2), respondents had automatically shifted responsibility for the provision of conflict counsel from 18-B Panel attorneys to individual attorneys assigned by the judiciary pursuant to County Law § 722(4), because, by operation of the statute, where there is no Combined Plan (under § 722[4]), or plan solely under County Law § 722(3), assignment of conflict counsel is the responsibility of the judiciary.

The City, apparently realizing that in order to claim it had a Combination Plan it would have to repeal the revocation of the

1965 Bar Plan, acted to resurrect the Bar Plan by issuing Executive Order No. 136, entitled "Repeal of Prior Executive Orders Relating to the Indigent Defense Plan for the City of New York." Executive Order No. 136, the repeal of the revocation, provides, in pertinent part, that whereas the CJC had promulgated rules (set forth in Chapter 13 of Title 43 of the Rules of the City of New York) that established a plan for representation of indigent defendants,

> "Executive Order No. 132 of 2010 and Executive Order No. 118 of 2008,[2] both entitled 'Indigent Defense Plan for the City of New York' are hereby repealed. Further, Executive Order No. 178 of 1965, entitled 'Furnishing Counsel to Indigent Criminal Defendants Within the City of New York,'is hereby repealed, *except that Criminal Defense Panels created under the authority of Executive Order 178 of 1965 and pursuant to the plan submitted by bar associations in accordance with subdivision 3 of section 722 of the County Law shall continue to exist and shall be administered in accordance with the rules of the Appellate Division, First and Second Judicial Departments"* (emphasis added).

Notably, under the purported "Bar Plan" that the City argues has been incorporated into its new plan, the 18-B Panel attorneys are no longer the designated conflict counsel, as they were under

[2]Executive Order No. 118 had also repealed Executive Order No. 178 of 1965.

the 1965 Bar Plan. While Executive Order No. 136 retains the Criminal Defense Panels created in 1965 "pursuant to the plan submitted by bar associations," the "Bar Plan" described by Chapter 13 was formulated by respondents, not by the bar associations.

The City's Bar Plan is markedly different from the version devised and approved by the County Bars in 1965. Petitioners stress that the County Bars were all signatories to the 1965 Combined Option Plan and the 1965 Bar Plan, and that they have not agreed with the recent effort by the City to modify the 1965 Bar Plan component of the Combined Option Plan. In fact, the County Bars have expressly objected to the alleged "Bar Plan" and to the City's attempt to unilaterally use fragments of the 1965 Bar Plan while discarding significant aspects of it in an effort to create a Combined Option Plan.

While the majority minimizes the differences between the original 1965 Bar Plan and the "Bar Plan" currently proposed by the City, the differences are material. For example, the County Bars' original 1965 plan provides that the Legal Aid Society is to be the primary provider of representation and 18-B Panel attorneys are to be conflict counsel. The 1965 plan does not permit the City to assign conflict cases to institutional

providers - all conflict cases are to be assigned to 18-B Panel attorneys. The new plan states that the City will make direct appointment of conflict counsel, which will be alternative providers selected through a procurement process (43 RCNY 13-03). This is clearly a sea change, not merely a rational supplement to the original 1965 plan as found by the majority, and is proof alone that the City's plan is not the 1965 Bar Plan.

The majority quotes from a decision issued in *New York County Lawyers Assn. v Bloomberg* (2011 WL 4444185, 2011 US Dist LEXIS 112929 [SD NY 2011]), where, in dismissing causes of action brought by plaintiffs for violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution based on lack of standing, Judge Batts wrote that the only actual change under the City's plan is that conflict cases are no longer automatically assigned to the 18-B Panels, and that there are no other changes to the rights and responsibilities of the County Bars with respect to the administration of the Panels.
I disagree with Judge Batts's assessment that this is the only change.

While the County Bars' original 1965 plan provides that the judiciary is to decide whether a conflict exists, under the City's plan, the institutional provider has the authority to

accept or decline a representation. The majority is incorrect in stating that the 1965 Bar Plan did not contain a provision regarding the supervision of conflict determinations. The 1965 Bar Plan states as follows:

"I. The Legal Aid Society

> "Under this Plan, whenever a determination has been made by a court that a defendant is entitled to representation under Article 18-B of the County Law, the court shall designate and appoint the Attorney-In-Charge of the Criminal Courts Branch of the Legal Aid Society as the attorney of record for the defendant in all cases, unless:
>
> "1) the court deems the assignment of other counsel to be required in the interest of justice because of either a conflict of interest or any other good cause, in which event the court shall appoint counsel to be designated by the appropriate Administrator from the appropriate panel as hereinafter provided . . ."

The City's plan substitutes institutional providers for some 18-B Panel lawyers, and transfers the authority to decide whether a conflict exists from the judiciary to the institutional providers. This is a considerable change in the way conflicts are handled.

Furthermore, the City's plan changes the management structure of the Bar Panels. Under the 1965 Bar Plan, each bar association submits a list of qualified attorneys to an

administrator or administrators appointed by the First and Second Departments, and upon receipt of the list, the administrator prepares panels from which assignments are made. The City of New York's only involvement in the management of the panels is that it pays the salaries of the administrators and staff. The City's plan creates an "Office of the Assigned Counsel Plan" (OACP), which is an office of the City, "responsible for management of the City's Criminal Defense Panels" (43 RCNY 13-01).

While the City and Legal Aid point out that the City's plan calls for the continued involvement of administrators from the First and Second Departments in that the OACP is overseen by two administrators in consultation with the Presiding Justices of the First and Second Departments, the salient point is that there were no provisions under the 1965 Bar Plan -- the only Bar Plan that was formulated and approved by the County Bars -- for an office of the Mayor to oversee the panels. I note that the majority has adopted the opinion expressed by the City in its brief that the City's plan to oversee this process is designed to avoid favoritism and nepotism, and observe that the majority is engaging in the type of merit review of the plan that it emphasizes is not the province of this Court.

Additionally, the City's plan does not include any provision

for the County Bars' continued participation in the attorney screening process for the panels, but instead replaces the County Bars' screening with "Screening and Advisory Committees" appointed by the Appellate Division (43 RCNY 13-01). Although respondents stress that the advisory committees already exist, this does not respond to petitioners' point that the City's plan has no provision to ensure the County Bars' continued participation in the attorney screening process.

In denying petitioners' challenge to the City's plan, the motion court's rationale was based on the premise, urged by the City and Legal Aid, that the new plan will be a combination plan pursuant to County Law § 722(4), as it has been in the past. However, this was an incorrect assumption. Petitioners stress that there is no "plan of a bar association," as contemplated by County Law § 722(3), because the bar associations have not approved the City's plan, which retains some portions of the 1965 Bar Plan but otherwise materially deviates from that plan. There is no dispute that the County Bars did not author, formulate, or agree to this new version of the Bar Plan. At bottom, although I disagree with the majority as to whether the changes to the 1965 Bar Plan are material, no matter how we characterize the changes, the ineluctable reality is that a "Bar Plan" that has not been

adopted, but instead has been rejected by the bar associations, is not "a plan of a bar association" as contemplated by County Law § 722(3). Calling it a plan of a bar association does not make it so. Despite the majority's repeated pronouncements that the City's plan is a bar plan, it is in fact a plan of the Mayor, the City and the CJC that has been imposed upon the County Bars and permits bar members to act as conflict counsel, not pursuant to a Bar Plan crafted by them, but in accordance with the City's vision and design.

The motion court observed that the County Bars had not adopted portions of the City plan, and held that the City has discretion under County Law § 722 to implement the plan without approval by the County Bars. The majority also holds that County Law § 722 imposes no obligation on the City to obtain County Bar approval of a § 722(2) option. But that is not the issue; petitioners do not dispute that the City has the right to select freely from the planning options under the statute. Rather, the pertinent and dispositive point is that while the City has the discretion, without the approval of the County Bars, to implement a plan for indigent defense under any of the options set forth in County Law § 722, it certainly does not and cannot have the discretion to implement a "plan of a bar association" as

contemplated by the statute, without the involvement and agreement of the bar associations.

Because there is no plan of a bar association, and there is no authority in the statute for the City to promulgate a plan of a bar association and impose that plan upon a bar association, it follows that the City's plan cannot be a combination of subdivision (2) (representation by institutional providers) and subdivision (3) (representation by counsel furnished pursuant to a plan of a bar association). This conclusion is reached upon consideration of the statute and the 1965 Bar Plan, and not, as intimated by the majority, any assessment of the wisdom or prudence of the City's plan or an exercise in judicial legislation under the guise of interpretation. I have engaged in a straightforward analysis of the meaning and intent of County Law § 722, and reviewed the various City enactments and the 1965 Bar Plan. On the other hand, the majority's conclusion that the City's revised plan is a valid § 722(4) combination plan, notwithstanding the clear evidence that the 1965 Bar Plan has been largely eviscerated by the City's plan and that there is currently no Bar Plan approved by the County Bars as is required for such a combination plan, defies logic.

The City's plan thus falls under County Law § 722(2). In

that circumstance, § 722(4) provides that a judge may appoint conflict counsel. The City's plan to appoint Legal Aid as conflict counsel, and, in so doing, bypass all judicial involvement in the appointment of conflict counsel, is not authorized by the statute. I am unpersuaded by respondents' argument, adopted by the majority, that the statute does not distinguish between conflict cases and all other cases, and that the City therefore has the authority to appoint conflict counsel by any method it deems appropriate.

The majority asserts that even if I am correct that the revised plan must be analyzed as a § 722(2) plan, my analysis under § 722(4) is flawed, and that accordingly the § 722(2) plan meets the statutory criteria of County Law § 722. I note that the City has not taken the position that its plan falls under § 722(2), most likely in recognition that the current structure of its plan must be deemed to fall under § 722(4) in order to be valid. Although the City has made the anemic argument that a judge would not be required to appoint conflict counsel where a county elects multiple institutional providers under § 722(2), with one provider taking primary assignment and the second taking conflict assignment, the City's overarching argument here is that its plan is a viable plan under § 722(4).

While the motion court and the majority are correct that County Law § 722(2), pertaining to institutional providers, does not distinguish between conflict and non-conflict cases, the statute as a whole draws a sharp distinction between conflict and non-conflict cases, particularly as it pertains to the use of institutional providers, by providing that when the City has not placed in operation a combination plan or plan under subdivision (3) – in other words, where the City has a plan under subdivision (1) or (2) - and there is a conflict, the judiciary may assign any attorney (§ 722[4]). The motion court noted that the judiciary's authority under § 722(4) to appoint conflict counsel would not be triggered where there was a combination plan under § 722(2) and (3), implicitly recognizing that the judiciary assigns conflict counsel in other instances pursuant to County Law § 722.

Had the Legislature intended a private legal aid bureau to be an appropriate source of conflict counsel in a § 722(2) plan, it would have said so, instead of providing for assignment of conflict counsel by the judiciary. In reading the statute as a whole, which the majority correctly points out is the proper method for construing legislative intent, there are three distinct subdivisions of the statute that refer to conflict cases

- - subdivisions (4) and (5), which refer to assignment of conflict counsel by the judiciary, and the recently revised subdivision (3), which pertains to representation pursuant to a plan of a bar association. Importantly, subdivision (3) was amended by the Legislature in June 2010 to add language referring to an office of conflict defender. County Law § 722(3)(a) now reads:

> "Representation by counsel furnished pursuant to *either or both of the following:* a plan of a bar association in each county or the city in which a county is wholly contained whereby: *(i)* the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service; *or (ii) such representation is provided by an office of conflict defender"* (added language italicized).

While the majority points out that the Legislature did not act on a proposed 2011 amendment to clarify the language in § 722(3), there are any number of reasons for the Legislature's failure to act, including considerations that have no bearing on the merit or utility of the proposed amendment. Our focus should be on the amendment that *was* passed, which, by adding language about an office of conflict defender to the subdivision pertaining to a plan of a bar association, links the concepts of conflict defender with representation pursuant to a bar plan.

The majority misconstrues my opinion when it suggests that I am interpreting the statute to make a bar plan under § 722(3) the sole mechanism for conflict defense, and thus engaging in impermissible judicial legislation. I acknowledge that the City could establish an office of conflict defender pursuant to § 722(3)(a)(ii), and that alternatively the City could choose a combination plan of § 722(1) and (2). I find that because the City has done neither, but instead has purportedly devised a combination plan of § 722(2) and (3) that is in reality no such thing, the City's plan impermissibly crafts an alternative option for the assignment of conflict counsel that is not set forth in the statute. Accordingly, the plan violates Municipal Home Rule Law §11(1)(e), which prohibits the adoption of a local law which supersedes a state statute, if such local law "affects the courts" (*see Goehler v Cortland County*, 70 AD3d 57, 60 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2012

CLERK